UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TOWN OF OYSTER BAY, Plaintiff,	:	
- against -	:	Case No. 05-CV-1945 (TCP)(AKT)
NORTHROP GRUMMAN SYSTEMS CORPORATION, THE UNITED STATES NAVY, and THE UNITED STATES OF AMERICA,	:	ORIGINAL TO BE FILED BY ECF
Defendants.	:	

NORTHROP GRUMMAN SYSTEMS CORPORATION'S OPPOSITION TO PLAINTIFF'S SECOND MOTION FOR RECONSIDERATION

TABLE OF CONTENTS

TABLE OF CONTENTS 1

INTRODUCTION 1

ARGUMENT 1

I. Reconsideration Should Be Denied Because Plaintiff's Motion Is Untimely. 1

II. The Town Cannot Rely On NYSDEC To Establish Consistency With The NCP Because NYSDEC Did Not Approve And Disapproved Of The Town's Cleanup Plan. 2

III. The Town Fails Even To Mention The Other Grounds For This Court's Decision. 4

CONCLUSION 5

CERTIFICATE OF SERVICE 6

INTRODUCTION

Defendant/Counterclaim Plaintiff Northrop Grumman Systems Corporation ("Northrop Grumman") hereby submits this opposition to Plaintiff/Counterclaim Defendant Town of Oyster Bay's (the "Town") second motion for reconsideration of this Court's Memorandum and Order dated May 14, 2009 (the "May 14, 2009 Order"), in which this Court found, based on the undisputed facts, that the Town failed to comply with the National Contingency Plan ("NCP") and therefore cannot recover its costs of remediation.

ARGUMENT

I. Reconsideration Should Be Denied Because Plaintiff's Motion Is Untimely.

Local Civil Rule 6.3 requires parties promptly to assert their grounds for reconsideration, and provides that motions seeking reconsideration "shall be served within fourteen days" after the court's determination of the original motion. The Town's motion should be denied because it is untimely and in clear violation of Local Rule 6.3. The Town's motion is entirely based on the Second Circuit's decision in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F. 3d 112 (2d Cir. 2010), which was decided in February 2010 while the Town's first motion for reconsideration was still pending. The Town should have made its arguments prior to this Court's May 21, 2010 Memorandum and Order denying the Town's first motion for reconsideration. (Document No. 106.) Instead, the Town waited to bring this second motion for reconsideration until nearly eight months after the Second Circuit decided *Niagara Mohawk* and nearly five months after this Court denied the Town's first motion for reconsideration. There is absolutely no justification for this delay in flagrant violation of Local Rule 6.3. Nor does the Town even purport to offer a justification.

If the Court nonetheless considers the merits of the Town's untimely, second motion for reconsideration, it should deny the motion for the reasons set forth below.[1]

II. The Town Cannot Rely On NYSDEC To Establish Consistency With The NCP Because NYSDEC Did Not Approve And Disapproved Of The Town's Cleanup Plan.

The Town argues that reconsideration is warranted by the Second Circuit's decision in *Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc.*, 596 F. 3d 112, 137 (2d Cir. 2010), in which the court held that that "one way of establishing compliance" with the NCP is "to conduct a response under the monitoring, and with the ultimate approval" (emphasis supplied) of the New York State Department of Environmental Conservation ("NYSDEC").

The Town's motion should be denied because it is based on a fiction. The undisputed facts demonstrate that NYSDEC disapproved of the Town's plan. *See* May 14, 2009 Order at 55-57. NYSDEC warned that the Town's plan was not cost effective, was not necessary, was a not one that NYSDEC would ever implement or require. *Id.* NYSDEC is not the steward of the Town's finances; as the owner of the Park Property, the Town was free to implement any excessively expensive remedy it chose. *Id.* at 56. When the Town repeatedly and stubbornly rejected NYSDEC's recommendation to implement a different cleanup plan, which would have been consistent with the NCP, NYSDEC refused to give its approval and made clear that the Town was implementing the excessive plan "at its own election and being at liberty to do so"—not at NYSDEC's direction. *Id.*

Faced with the immutable fact that NYSDEC expressed disapproval – not approval – of the Town's plan, the Town tries to evade NYSDEC's clearly articulated position.

---

[1] Northrop Grumman incorporates by reference its briefs in support of its motion for summary judgment and in opposition to the Town's motion, as well as its brief in opposition to the Town's first motion for reconsideration.

The Town asserts that NYSDEC's "degree of enthusiasm" about the Town's plan "is simply not a factor." (Plf.'s Br. at 2.) This attempt to maneuver around NYSDEC's disapproval leaves the Town twisted in knots. On the one hand, the Town is attempting to rely on the Second Circuit's holding that NYSDEC's approval of a remedial plan is one way of establishing consistency with the NCP. On the other hand, the Town argues that NYSDEC's rejection of its plan is irrelevant. The Town's position makes no sense and is not an accurate statement of the law.

While NYSDEC's endorsement or silent acquiescence of a private party's cleanup plan may bestow a presumption of consistency with the NCP, the Second Circuit's decision cannot be read to compel that result where, as here, NYSDEC expressly warned that the Town's plan was not necessary, was not cost effective, and was not one that NYSDEC would ever require or implement. The Town's argument that it may nevertheless rely on NYSDEC to establish consistency with the NCP flies in the face of logic as well as the Second Circuit's decision. The *Niagara Mohawk* case does not require this Court to ignore NYSDEC's disapproval and cast aside the undisputed facts demonstrating the Town's inconsistency with the NCP merely because NYSDEC did not block the Town, as the owner of the Park Property, from implementing its excessively expensive plan "at its own election."

Furthermore, even if NYSDEC had approved the Town's plan, which it did not, such an approval would have bestowed only a rebuttable presumption of consistency with the NCP.[2] In this case, any presumption of consistency is decisively rebutted because this Court already found, based on the undisputed facts, that the Town violated key NCP requirements, including, among others, the requirement to select and implement a cost-effective remedy. *See* May 14, 2009 Order at 52-60.

---

[2] Not even cleanup actions performed directly by a state or even by EPA itself are deemed to be consistent with the NCP as a matter of law, but are entitled only to a rebuttable presumption of consistency. *See* Northrop Grumman's Opposition to Plaintiff's Motion for Summary Judgment at 8-9 and cases cited therein (Document No. 69, filed June 25, 2008). The issue of a rebuttable presumption of consistency did not arise in the *Niagara Mohawk* case. In that case, the plaintiff argued that summary judgment was appropriate because the defendant had offered "no evidence" (continued…)

The plain fact is that the Town rejected NYSDEC's recommendation that it implement a different plan; and "at its own election and being at liberty to do so" decided to implement an expensively excessive and unnecessary cleanup plan that NYSDEC did not approve and in fact disapproved. In light of these undisputed facts, the Second Circuit's decision in *Niagara Mohawk* neither requires nor warrants reconsideration of this Court's May 14, 2009 Order finding that the Town failed to comply with the NCP.

III. The Town Fails Even To Mention The Other Grounds For This Court's Decision.

The standard for granting a motion for reconsideration "is strict, and reconsideration will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked—matters, in other word, that might reasonably be expected to alter the conclusion reached by the court." *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1990).

The Town cannot meet its burden to show that this Court would have changed its decision because it fails even to mention the other sufficient, independent grounds for this Court's conclusion that Northrop Grumman is not liable for the Town's costs under CERCLA. In addition to determining that the Town failed to comply with the NCP, this Court also

---

challenging compliance with the NCP. Reply Brief of Niagara Mohawk Power Corporation, 2009 WL 6769456 at *33-34 (2d Cir. Feb. 23, 2009) (". . . the DEC's approval of the response costs was evidence of compliance and there was additional expert evidence of compliance. Because Chevron offered no evidence to the contrary, summary judgment was appropriate."). In the present case, by contrast, this Court has already found that the Town violated the NCP. *See* May 14, 2009 Order at 52-60.

determined that the Town's costs were not "necessary costs of response," as required under 42 U.S.C. § 9607(a)(4)(B), because the Town "spent millions of dollars to address risks which did not even exist." May 14, 2009 Order at 60. The Town does not address this basis for the Court's decision in its motion for reconsideration and nothing in the *Niagara Mohawk* case suggests that a CERCLA plaintiff may recover the costs of an unnecessary cleanup action.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Second Motion for Reconsideration.

Dated: Washington, D.C.
December 17, 2010

Respectfully submitted,

/s/ Allan J. Topol
Allan J. Topol (AT 0746)
Thomas E. Hogan (TH 8769)
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 662-6000

Attorneys for Northrop Grumman Systems Corporation

CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2010, a copy of foregoing was served by U.S. First Class Mail from Washington, D.C. to all parties as follows:

Stephen J. Smirti, Jr.
Janice M. Greenberg
Rivkin Radler LLP
926 RXR Plaza
Uniondale, NY 11556-0926

Theodore W. Firetog
Law Offices of Theodore W. Firetog
111 Thomas Powell Boulevard
Farmingdale, NY 11735-2251

Robert B. Kambic
United States Attorney's Office
Eastern District of New York
610 Federal Plaza, 5th Fl.
Central Islip, New York 11722

/s/ Thomas E. Hogan
Thomas E. Hogan (TH 8769)